Nos. 83-1065 and 83-1240

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

THE COUNTY OF ONEIDA, NEW YORK, *et al.*,
Petitioners,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,
Respondents.

THE STATE OF NEW YORK,
Petitioner,

v.

THE ONEIDA INDIAN NATION OF NEW YORK STATE, *et al.*,
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF THE AMERICAN LAND TITLE ASSOCIATION AS AMICUS CURIAE

in Support of the Counties of Oneida and Madison, Petitioners in No. 83-1065 and Respondents in No. 83-1240

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3 PP

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Statutes

TABLE OF AUTHORITIES—Continued

INTEREST OF THE AMICUS CURIAE

The American Land Title Association is the national trade association of the land title industry. The Association has approximately 2,000 members, including land title insurers, title insurance agents, abstracters, and associate members. The principal function of the land title industry is to facilitate the safe, certain and efficient transfer of title to real estate in both residential and commercial transactions by ascertaining and insuring the rights of purchasers, mortgage lenders and others in the real estate that is the subject of those transactions.

The interest of the American Land Title Association in this case arises because of the interest of the Association and its members in the certainty and predictability of the laws affecting titles to and rights in real estate. This Court has long recognized the importance of stability in real estate titles. *See, e.g., Nevada v. United States*, —— U.S. ——, 77 L. Ed. 2d 509, 524 n.10 (1983) (quoting *Minnesota Co. v. National Co.*, 70 U.S. (3 Wall.) 332, 334 (1865)); *Arizona v. California*, —— U.S. ——, 75 L. Ed. 2d 318, 334 (1983); *United States v. Title Ins. & Trust Co.*, 265 U.S. 472 (1924).

This case threatens the stability of titles to real estate like few cases that have come before. The threat extends not only to the 100,000 acres of land in New York acquired from the Oneidas in 1795 in the transaction that is the subject of this litigation, but also to additional land in New York and in other states that was acquired from Indian tribes in similar situations. The statement of the case by petitioners the County of Oneida and the County of Madison (hereinafter "Counties") describes the nature of the claim asserted by respondents Oneida Indian Nation of New York, Oneida Indian Nation of Wisconsin, and Oneida of the Thames Band Council (hereinafter "Oneidas"). The gravamen of the claim asserted by the Oneidas is that the purchase in 1795 of 100,000 acres of land from the Oneida Nation by the State of New York is void because there was no federal participation in the transaction as allegedly

required by section 8 of the Trade and Intercourse Act of 1793.[1]

Because of this alleged lack of federal participation, the Oneidas maintain, and the courts below held, that all subsequent transfers of the 100,000 acres acquired by New York in 1795 are also void. Defenses based on statutes of limitations, laches, adverse possession, and the good faith of innocent purchasers were ruled inapplicable as a matter of law. 434 F. Supp. at 541-44, Jt. App. at 71a-76a. In the view of the courts below, the Oneidas have a present right to possess the 100,000 acres of land that their ancestors last possessed in 1795, despite the intervening two centuries of good faith occupation and development of the 100,000 acre tract by thousands of landholders.

As indicated above, the threat to the stability of real estate titles presented by the ruling in this case extends beyond the 100,000 acres acquired from the Oneidas in 1795. New York acquired an additional 150,000 acres of land from the Oneidas in roughly 25 transactions between 1800 and 1848. The Oneidas allege that these transactions are likewise void because of a lack of federal participation, and assert a present right to possess the land involved.[2] New York acquired land from other

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[1] Act of March 1, 1793, ch. 19, § 8, 1 Stat. 329.

[2] *See Oneida Indian Nation v. County of Oneida*, Civ. No. 74-CV-187 (N.D.N.Y. filed May 3, 1974) (action for damages challenging approximately 25 transactions with New York); *Oneida Indian Nation v. Williams*, Civ. No. 74-CV-167 (N.D.N.Y. filed 1974) (action for ejectment against 23 landowners).

The Oneidas have also filed suit seeking to be restored to possession of approximately 5,750,000 acres of land acquired by New York in two transactions in 1785 and 1788, alleging that those two acquisitions violated the Articles of Confederation because they were made without the participation of the confederal government and therefore were void. *See Oneida Indian Nation of New York v. New York*, 691 F.2d 1070 (2d Cir. 1982). The suit challenging the 1785 and 1788 acquisitions poses many of the same issues that are raised by this case.

Indian tribes during the period from 1785 to approximately 1840, and those tribes similarly assert that the transactions are void and therefore that the tribes have a present right to possess the land.[3]

Nor is the impact of this case limited to the State of New York. Claims similar to those asserted by the Oneidas are pending or threatened in Connecticut, Louisiana, Massachusetts, South Carolina, Texas, and elsewhere.[4]

One factor that remains constant with respect to all of the claims is that the current landholders are innocent, good faith occupants of the land now being claimed by Indian tribes. Whatever wrongs may have been perpetrated on Indian groups generations ago were done without the knowledge or participation of the thousands of private landowners who possess the land today. Irrespective of the arguments, legal or equitable, that Indian groups such as the Oneidas can marshal to show that New York should not have acquired their land in

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[3] *See, e.g., Cayuga Indian Nation of New York v. Cuomo*, 565 F. Supp. 1297 (N.D.N.Y. 1983); *Canadian St. Regis Band of Mohawk Indians v. New York*, 97 F.R.D. 453 (N.D.N.Y. 1983).

[4] *See Catawba Indian Tribe of South Carolina v. South Carolina*, 718 F.2d 1291 (4th Cir. 1983), *petition for rehearing en banc granted* (Dec. 20, 1983); *Mohegan Tribe v. Connecticut*, 638 F.2d 612 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981); *Schaghticoke Tribe v. Kent School Corp., Inc.*, 423 F. Supp. 780 (D. Conn. 1976); *Wampanoag Tribal Council of Gay Head, Inc. v. Town of Gay Head*, No. 74-5826-MCN (D. Mass. filed 1974); *Christiantown Tribe v. Watt*, No. 81-3206-S (D. Mass. filed Dec. 18, 1981); *Chappaquiddick Tribe v. Watt*, No. 81-3207-S (D. Mass. filed Dec. 18, 1981); *Herring Pond Tribe v. Watt*, No. 81-3208-S (D. Mass. filed Dec. 18, 1981); *Troy Tribe v. Watt*, No. 81-3209-S (D. Mass. filed Dec. 18, 1981); *see also* Statute of Limitations Claims List, 48 Fed. Reg. 51204, 51252 (Nov. 7, 1983); 48 Fed. Reg. 13698, 13920 (Mar. 31, 1983) (Department of the Interior listing of potential Indian land claims in the "Eastern Area"); *cf. Alabama Coushatta Tribe of Texas v. United States*, Cong. Ref. No. 3-83 (U.S. Claims Ct.) (claiming tribe possesses unextinguished aboriginal title to 17 counties in Texas).

1795, it would be an unprecedented miscarriage of justice for this Court to render a decision that would mean that thousands of current landholders have no right to possess their homes, farms and businesses because the federal government did not participate sufficiently in the acquisition of Indian land almost two centuries ago.

SUMMARY OF ARGUMENT

The Counties advance four arguments why the Oneida claim should not prevail: (1) the United States subsequently ratified and therefore validated the 1795 acquisition by New York, (2) the Oneidas do not have a cause of action against the counties under federal law, (3) the Oneida claim is barred because it was not brought until 175 years after the conveyance at issue, and (4) the Oneida claim presents nonjusticiable political questions. The American Land Title Association endorses these arguments and joins in them. The Association addresses the first three of these arguments in its brief.

The arguments advanced by the Counties all share a common theme. It was, and is, the responsibility of the executive and legislative branches of the federal government to address the fundamental issues raised by the Oneida claim. It was the responsibility of Congress and the executive branch in 1795 to determine whether New York's acquisition of land from the Oneidas contravened federal policy and, if it did, to take whatever steps were advisable to make New York comply with that federal policy. It is the responsibility of Congress and the executive branch today to determine what remedial action, if any, should be taken at this late date with respect to what occurred 190 years ago. Indian tribes or private parties should not be allowed to usurp this federal governmental responsibility through lawsuits against current landholders.

ARGUMENT

I. The United States Ratified the 1795 Acquisition of Oneida Land By the State of New York.

The courts below ruled not only that New York acquired the Oneidas' land without obtaining the approval of the federal government in 1795, but also that the federal government has never subsequently approved the acquisition. *See* 719 F.2d at 539, Jt. App. at 235a-37a; 434 F. Supp. at 538-40, Jt. App. at 64a-67a. The courts below appeared to view the 1795 acquisition as if it involved only a small parcel of land that could easily and understandably be overlooked by the federal government for 190 years.[5] The 1795 acquisition, of course, did not involve a parcel that could so easily be overlooked. It involved 100,000 acres (roughly 150 square miles) that comprised 40 percent of the Oneidas' then-existing res-

[5] In rejecting the Counties' argument that the United States ratified the 1795 acquisition by its approval of acquisitions by New York in 1798 and 1802 that referred to the 1795 acquisition, the Court of Appeals stated there was no evidence that in 1798 and 1802 "the federal authorities were then aware of any claim of illegality of the prior land sale." 719 F.2d at 539-40, Jt. App. at 237a. Earlier in its opinion, however, the Court noted that in 1795 "the federal authorities repeatedly urged New York State Governor Clinton and his successor Governor John Jay to seek and secure the appointment of federal commissioners before the State negotiated any purchase of Indian lands," 719 F.2d at 529, Jt. App. at 212a, and indeed the Indian Claims Commission decision upholding the Oneidas' breach of fiduciary duty claim against the United States with respect to the 1795 acquisition determined that the federal government knew of that acquisition at the time it was made and described a barrage of correspondence involving the President, the Attorney General, the Secretary of War, the federal Indian agent for New York, and Governor Jay attempting to stop New York from proceeding with the 1795 acquisition unless a federal commissioner were present. *See Oneida Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 379-84 (1978). Clearly, in addition to their other failings, the federal authorities were cursed with short memories, since, according to the Court of Appeals, by 1798 they had forgotten the transaction they had supposedly so vigorously opposed in 1795.

ervation. Moreover, the 1795 transaction was but one of a series of transactions by which New York acquired 250,000 acres of land from the Oneidas after 1790.

It is preposterous to suggest that the federal government somehow overlooked for 190 years a transfer involving 150 square miles in New York. It is even more preposterous to suggest that the United States withheld its approval of that transfer for 190 years while permitting the State of New York and countless thousands of innocent individuals to act on a mistaken belief concerning the ownership of the land. Neither of these suggestions is tenable. The truth of the matter is that the United States ratified New York's 1795 acquisition of Oneida land. This is the only satisfactory explanation of the United States' course of conduct since 1795.[6]

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[6] It may well be that the ratification of the 1795 acquisition by the United States constituted a breach of its fiduciary duty to the Oneidas. The Oneidas brought an action for breach of fiduciary duty against the United States before the Indian Claims Commission with respect to the 1795 acquisition as well as the other acquisitions by the State of New York, and prevailed. *See United States v. Oneida Indian Nation of New York*, 477 F.2d 939 (Ct. Cl. 1973), *on remand*, 43 Ind. Cl. Comm. 373 (1978) (United States breached its fiduciary duty to Oneidas by failing to protect them in land sales to New York). Before the Indian Claims Commission could determine the recovery to which the Oneidas were entitled because of this breach of fiduciary duty, the Oneidas elected to dismiss their claim. The Oneidas' decision to renounce their claim, of course, does not negate the fact that Congress did provide them with a remedy. Indeed, courts have held that Congress intended the Indian Claims Commission to be the exclusive remedy for ancient Indian land claims. *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States*, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982); *Navajo Tribe of Indians v. New Mexico*, Civ. No. 82-1148-JB (D. New Mex. Jan. 23, 1984), *appeal pending; see also Six Nations Confederacy v. Andrus*, 610 F.2d 996, 998 (D.C. Cir. 1979), *cert. denied*, 447 U.S. 922 (1980) ("Because Congress enacted a special and exclusive system for determination of claims under the Indian Claims Commission Act, appellant could not choose for itself another avenue of relief. Congress had selected the route that had to be followed."); *Temoak*

It is clear that the United States can subsequently ratify transfers governed by the land transfer provisions of the trade and intercourse acts. Indeed, courts have held that the United States has done so with respect to a number of Indian land transfers in New York. *See United States v. National Gypsum Co.*, 141 F.2d 859 (2d Cir. 1944); *Seneca Nation v. United States*, 173 Ct. Cl. 912 (1965); *Seneca Nation v. Christy*, 126 N.Y. 122, 27 N.E. 275 (1891), *writ of error dismissed on other grounds*, 162 U.S. 283 (1896); *Buffalo, Rochester & Pittsburgh Railway Co. v. Lavery*, 82 Sup. Ct. 396, 27 N.Y.S. 443 (App. Div. 1894), *aff'd on opinion below*, 149 N.Y. 576 (1896). For example, in *Seneca Nation v. United States*, 173 Ct. Cl. 912 (1965), the Senecas sued the United States under the Indian Claims Commission Act alleging that the United States failed to bring an action against the State of New York to recover land that was taken by New York without federal approval and therefore in violation of the Trade and Intercourse Act. The Court of Claims determined that the Senecas were not entitled to recover from the United States because the United States had approved the 1858 transfer:

> [I]f federal consent was needed under the Trade and Intercourse Act, such approval has been given. All agree that appellant would have no complaint if assent had been given at the time of the appropriations. *But approval can also come afterwards*, and that is what happened here. In 1927, Congress provided that New York's game and fish laws should thereafter apply to the Senecas' Oil Spring Reservation (among others), except "that this Act shall be inapplicable to lands formerly in the Oil Spring

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Band of Western Shoshone Indians v. United States, 593 F.2d 994, 997-99 (Ct. Cl.), *cert. denied*, 444 U.S. 973 (1979) ("There can be no doubt that Congress passed the Indian Claims Commission Act, 25 U.S.C. § 70 and ff, with the object of drawing in all claims of ancient wrongs, respecting Indians, and to have them adjudicated once and for all.")

> Reservation and heretofore acquired by the State of New York by condemnation proceedings." *This explicit recognition and implicit ratification of New York's ownership of the tract must be taken as Congress's approval of the original appropriation, as well as of the state's continued claim of right.*

173 Ct. Cl. at 915 (emphasis added).

Similarly, in *United States v. National Gypsum Co.*, 141 F.2d 859 (2d Cir. 1944), the United States Court of Appeals for the Second Circuit considered an action brought by the United States on behalf of an Indian tribe to void two leases on the ground that the leases were made without federal approval in violation of the land transfer provision of the Trade and Intercourse Act. The Second Circuit ruled that the federal government had implicitly approved the leases. As Judge Augustus Hand explained:

> For many years it has been the *understanding* of the Department of the Interior, the Commissioner of Indian Affairs and the State authorities that the Tonawanda Reservation stood in a unique position and that its transfer to the Comptroller in trust empowered the State to provide for leases of reservation lands and that leases of such lands have been made under a comprehensive plan set up under State authority and warranted by the terms of the original treaty with the Tonawandas. It is not doubted that Congress could make other provisions for the disposition of the lands of the Tonawandas and can make them for any further leases, but until it does so we think that *a status so long maintained with the approval of the United States government should be recognized and is not in contravention of 25 U.S.C.A. § 177, R.S. § 2116.*

Id. at 863 (emphasis added).

In other contexts involving Indian tribes, courts have held that subsequent conduct by the United States can validate an action illegal at the time it was committed. *See, e.g., Shoshone Tribe v. United States*, 299 U.S. 476 (1937); *United States v. Creek Nation*, 295 U.S. 108 (1935); *United States v. Northern Paiute Nation*, 490 F.2d 954 (Ct. Cl. 1974). For example, in *Shoshone Tribe* the United States settled the Northern Arapaho Tribe on the Shoshone reservation despite a treaty providing that the Shoshone reservation would be "set apart for the absolute and undisputed use and occupation of the Shoshone Indians." 299 U.S. at 485-86. Nothwithstanding repeated protests by the Shoshones, the United States continued to maintain the Arapahoes on the Shoshone reservation, and in time regarded the Arapahoes as co-owners of the Shoshone reservation. *Id.* at 488-90. Ultimately the Shoshones sued for compensation. In fixing the date when the United States acquired the portion of the Shoshone reservation given to the Arapahoes, this Court determined that, because the United States had ratified the wrong, the date of taking occurred at the time of the original illegal entry.

> Looking at events in retrospect through the long vista of the years we can see that from the outset the occupancy of the Reservation was intended to be permanent; that, however tortious in its origin, it has been permanent in fact; and that the Government of the United States *through the action and inaction of its executive and legislative departments for half a century has ratified the wrong, adopting the de facto appropriation by relation as of the date of its beginning.*

299 U.S. at 495 (emphasis added).

The principles developed in these cases make it clear that the federal government can subsequently ratify and approve a transfer of Indian land to which the land transfer provision of the Trade and Intercourse Act applies, and in fact the United States has ratified and approved the 1795 acquisition of the Oneida lands by the State of New York. The 1798 and 1802 acquisitions by New York, which were explicitly approved by the United States, referred to the 1795 acquisition as an accom-

plished fact. The agreement concerning the 1798 acquisition of Oneida land by New York provided in part:

> The said [Oneida] Indians do cede release and quit claim to the People of the State of New York, forever, All the Lands within their Reservation to the Westward and Southwestward of a Line from the Northeastern corner of *the Lot No. 54, in the last purchase from them* running northerly to a button wood tree . . . .

Jt. App. at 36a (emphasis added). The phrase "last purchase from them" refers to the 1795 acquisition, and "lot No. 54" was clearly included within the 1795 acquisition. A United States commissioner was present at the signing of the 1798 agreement and Congress ratified the 1798 agreement on February 13, 1799.

On June 4, 1802, New York and the Oneida Nation entered into another agreement for the acquisition of Oneida lands. The 1802 agreement provided in part:

> All that certain Tract of Land, beginning at the Southwest corner of the Land lying along the Genesee road . . . thence southerly in the direction of the continuation of the east bounds of said last mentioned tract, to *other lands heretofore ceded* by the said Oneida Nation of Indians, to the people of the State of New York then along the same westerly, to a part of said last mentioned Land, called the Two-mile strip and thence along the same, northerly to the place of Beginning.

Jt. App. at 38a-39a (emphasis added). Again, the phrase "other lands heretofore ceded" refers to the land acquired from the Oneidas by New York in 1795. A United States commissioner was also present at the signing of the 1802 agreement and Congress ratified the agreement on December 31, 1802.

Apart from the approval of the 1795 acquisition given through the 1798 and 1802 agreements, the "action and inaction of [the] legislative and executive departments"

for 190 years demonstrates that the United States has approved the 1795 acquisition.[7] It is simply too late in the day to pretend after 190 years of federal action to the contrary that the United States has withheld its approval of the 1795 acquisition and intended the Oneidas to retain the right to possess this land.

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[7] The United States has taken numerous actions that are inconsistent with any supposed recognition on its part of ownership rights by the Oneidas in the 100,000 acre tract. For example, Interstate 90, a federally assisted highway, traverses the tract. Presumably the United States has filed and enforced federal tax liens against real property owned by persons other than the Oneidas located within the tract, and the Federal Housing Administration and the Veterans Administration have made loans secured by property located within the tract. Such conduct is inconsistent with any federal recognition of the rights asserted by the Oneidas. It is also beyond dispute that the federal government was well aware of the circumstances of New York's acquisition of the Oneidas' lands, both at the time the acquisition occurred, *see Oneida Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 379-84 (1978), and subsequently. *See* Letter from Oscar L. Chapman, Under Secretary of the Interior, to Senator Hugh Butler, Chairman, Committee on Interior and Insular Affairs (March 1, 1948), *reprinted in* S. Rep. No. 1137, 80th Cong., 2d Sess. 4-5 (1948); Letter from Ray L. Wilbur, Secretary of the Interior, to Senator Lynn J. Frazier, Chairman, Committee on Indian Affairs (October 12, 1929), *reprinted in* Hearings on H.R. 9720 Before the House Comm. on Indian Affairs, 71st Cong., 2d Sess. 189 (1930) ("In some instances such transactions [between New York and Indian tribes] were had with the sanction of the Federal Government and in others without such sanction other than such as might be implied. That is, as to those transactions between the Indians and the State not expressly sanctioned, no protest or opposition thereto has ever been raised, at least in so far as the legislative and executive branches of the Federal Government are concerned."); Report by John R. T. Reeves to the Commissioner of Indian Affairs, Dec. 26, 1914, *reprinted in* H.R. Doc. No. 1590, 63d Cong., 3d Sess. 14 (1915). Thus it simply cannot be maintained, as the Court of Appeals below seemed to suggest, that the United States acted in derogation of the Oneidas' purported rights in the 100,000 acre tract because the United States was unaware of any claim of illegality with respect to the 1795 acquisition.

II. The Oneidas Have No Cause of Action Under Federal Law Against Current Landholders.

Neither federal common law nor federal statutory law provides the Oneidas with a cause of action against current landholders. Because there was no federal common law prior to the Court's decision in *Swift v. Tyson*[8] in 1842, no federal common law cause of action arose in favor of the Oneidas at the time of New York's allegedly improper 1795 acquisition. In any event, the Trade and Intercourse Act of 1793 would have preempted any federal common law cause of action if one had otherwise been available. No cause of action arose in favor of the Oneidas under federal statutory law, because Congress did not intend to permit an implied private right of action under the 1793 Trade and Intercourse Act.

A. *The Oneidas have no cause of action under federal common law against current landholders.*

As Judge Meskill, dissenting in the Court of Appeals below, noted, the federal common law cause of action upheld by the majority below "is truly a novel legal principle. There never has been, and this Court should not now create, a federal common law action. No case has ever held that an Indian tribe may maintain a direct action for damages based upon federal common law." 719 F.2d at 545, Jt. App. at 250a (Meskill, J., dissenting). It is hardly surprising that no court recognized such a cause of action before, since in the early years of our federal system, when the 1795 acquisition occurred, there simply was no federal common law. This Court stated in *Wheaton v. Peters*, 33 U.S. (8 Pet.) 591 (1834):

> It is clear there can be no common law of the United States. The federal government is composed of twenty-four sovereign and independent states, each of which may have its local usages, customs, and common law. There is no principle which pervades

[8] 41 U.S. (16 Pet.) 1 (1842).

> the Union and has the authority of law that is not embodied in the Constitution or laws of the Union. The common law could be made a part of our federal system only by legislative adoption. When, therefore, a common law right is asserted, we must look to the State in which the controversy originated.

Id. at 658; *accord Sim's Lessee v. Irvine*, 3 U.S. (3 Dall.) 425, 457 (1799); *Brown v. Van Braam*, 3 U.S. (3 Dall.) 344, 356 (1797). The Oneidas, therefore, had no federal common law cause of action when the 1795 transaction occurred. While federal courts began to develop federal common law after this Court's decision in *Swift v. Tyson* in 1842, "it remains true that federal courts, unlike their state law counterparts, are courts of limited jurisdiction that have not been vested with open-ended lawmaking powers." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 95 (1981); *accord City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981). Because the instances in which federal courts may create federal common law are "few and restricted," *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981); *City of Milwaukee v. Illinois*, 451 U.S. 304, 313 (1981), this Court should not permit this limited authority to be used to create today a federal common law cause of action to challenge a transaction that occurred 190 years ago.

Assuming *arguendo* that a federal common law cause of action would otherwise have existed, the 1793 Trade and Intercourse Act preempted that cause of action. *City of Milwakuee v. Illinois*, 451 U.S. 304 (1981), provides the standard for analyzing whether the Oneida cause of action is preempted. The Court's decision in *City of Milwaukee* established that the relevant test for preemption was "whether the legislative scheme 'spoke directly to a question' . . . not whether Congress had affirmatively proscribed the use of federal common law." *Id.* at 315. The Court noted that "when the question is whether statutory or federal common law governs . . . 'we start with the assumption' that it is for Congress, not federal

courts, to articulate the apropriate standards to be applied as a matter of federal law." *Id.* at 316-17.

Applying the *City of Milwaukee* preemption test shows that the 1793 Trade and Intercourse Act preempted any federal common law remedy that might otherwise have existed.[9] The 1793 Act clearly "spoke directly to the question" of federal supervision of land transfers by Indian tribes by comprehensively regulating the circumstances under which land could be acquired from Indian tribes and by imposing criminal penalties for violations of the act's prohibitions. Negotiation for the purchase of an interest in Indian land without the approval of the United States was made a misdemeanor punishable by imprisonment not exceeding 12 months and a fine not exceeding $1,000. Act of March 1, 1793, ch. 19, § 8, 1 Stat. 329. The same criminal penalty was imposed on a person making an unauthorized settlement on Indian land. *Id.* § 5. The President was authorized to take such measures as he might deem necessary to remove unlawful settlers. *Id.* Informant's suits were authorized to assist in the enforcement of the criminal fines. If an informant initiated the prosecution, he would receive one-half of the total fine collected, and the other half would go to the United States. If the United States instituted the prosecution, it received all of the fines collected. *Id.* § 12.

These provisions demonstrate that the 1793 Act was, particularly within the context of its time, a comprehensive statutory scheme for the regulation of Indian affairs and specifically for the acquisition of Indian lands. This comprehensive statutory scheme preempted any federal common law action that might otherwise have existed.

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[9] *See* Crane, *Congressional Intent or Good Intentions: The Inference of Private Rights of Action Under the Indian Trade and Intercourse Act*, 63 B.U.L. Rev. 853, 906-10 (1983).

B. *The Oneidas have no implied private right of action under the 1793 Act against current landholders.*

The Oneidas also lack a federal statutory cause of action against current landholders. Such a cause of action, if one were to exist, must be derived from the 1793 Trade and Intercourse Act. Since the 1793 Trade and Intercourse Act does not explicitly grant a cause of action to Indian tribes, any statutory cause of action under the 1793 Act in favor of Indian tribes must be implied from the statute.

Congressional intent is the touchstone for determining whether an implied private right of action can be asserted. *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 13 (1982); *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 91 (1981). Only if Congress intended to create an implied private right of action under the 1793 Trade and Intercourse Act can the Oneidas assert such an action against current landholders. The factors used to determine legislative intent include "the language of the statute itself, its legislative history, the purpose and structure of the statutory scheme, and the likelihood that Congress intended to supersede or to supplement existing state remedies." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 91 (1981); *accord, Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 13 (1982); *Universities Research Association v. Coutu*, 450 U.S. 754, 770 (1981).

The first factor used to determine congressional intent is the language of the statute. *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 16 (1979). Section 8, the land transfer provision of the 1793 Trade and Intercourse Act, provided:

> [N]o purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into

> pursuant to the constitution; and it shall be a misdemeanor, in any person not employed under the authority of the United States, in negotiating such treaty or convention, punishable by fine not exceeding one thousand dollars, and imprisonment not exceeding twelve months, directly or indirectly to treat with any such Indians, nation, or tribe of Indians, for the title or purchase of any lands by them held or claimed . . . .

Act of March 1, 1793, ch. 19, § 8, 1 Stat. 329.

Section 8 is a criminal statute imposing criminal penalties of fines and imprisonment for its violation. This Court "has rarely inferred a private right of action under a criminal statute, and where it has done so, 'there was at least a statutory basis for inferring that a civil cause of action of some sort lay in favor of someone.'" *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979) (quoting *Cort v. Ash*, 422 U.S. 66, 79 (1975)). There is nothing in the language of section 8 that indicates that Congress intended to permit an Indian tribe to bring a private right of action to enforce the provisions of section 8. *See* Crane, *supra* n.9, at 863-67.

The legislative history of the 1793 Act likewise provides no support for an implied right of action in favor of an Indian tribe to enforce section 8 of the Act. The 1793 Act was enacted to replace the 1790 Trade and Intercourse Act, which had in turn been intended as a "declarative law" recognizing the right of Indians to possess their lands, subject to divestment by the United States. 1 *American State Papers: Indian Affairs* 53-55 (1834) (report of Secretary of War Henry Knox).

The federal officials administering the 1790 Act became concerned that the means of enforcing the 1790 Act were inadequate, and urged Congress to add enforcement provisions to the act. *See* 1 *Messsages and Papers of the President* 105 (J. Richardson ed. 1896); 1 *American State Papers: Indian Affairs* 119; *see also* Crane, *supra* n.9, at 874-75. Congress responded by enacting in

the 1793 Trade and Intercourse Act a comprehensive scheme of enforcement provisions to "give energy to" the Act. As already noted, section 8 of the 1793 Act made it a criminal offense to negotiate for the purchase of an interest in Indian land without the approval of the United States. In the 1793 Act, unauthorized settlement on Indian land was made subject to the same criminal penalty. Act of March 1, 1793, ch. 19, § 5, 1 Stat. 329. In addition the President was given authority to take such measures as he might deem necessary to remove unlawful settlers. *Id.*[10] Other sections of the 1793 Act contained additional enforcement provisions. *Id.* §§ 1-3, 6.

The comprehensiveness and variety of these enforcement mechanisms shows that Congress did not also intend to authorize Indian tribes to bring private rights of action under the Act against landholders. "In view of these elaborate enforcement provisions it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens . . . . In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 14 (1981). "The comprehensive character of the remedial scheme expressly fashioned by Congress strongly evidences an intent not to authorize additional remedies." *Northwest Airlines, Inc. v. Transport Workers Union*, 451 U.S. 77, 93-94 & n.30 (1981). If Congress had wanted to authorize such a private right of action, "it knew how to do so and [would have done] so expressly." *Touche, Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979).

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[10] The 1796 Trade and Intercourse Act made clear that this provision meant that the President was authorized to use military force to expel unauthorized settlers from Indian land. Act of May 19, 1796, ch. 30, § 5, 1 Stat. 469. *See*, F. Prucha, *American Indian Policy in the Formative Years* 145 (1962). On several occasions this authority was used to evict unauthorized settlers. Prucha, *supra* at 154, 159-60, 165-66, 181.

The historical context of the 1793 Act and the purpose for its enactment also demonstrate that Congress did not intend to authorize a private right of action by Indian tribes against landholders. Legislation relating to Indian affairs "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted [the legislation]." *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978). Viewing the 1793 Trade and Intercourse Act in the context of its times, it is inconceivable that Congress would have expected Indian tribes to bring suits or would have intended to provide Indian tribes with an implied private right of action in federal courts.

The primary aspect of the historical context of the 1793 Act demonstrating that Congress did not intend to create a private right of action in favor of Indian tribes is quite simply that Indian tribes did not make a practice of filing lawsuits in 1793. Writing 40 years after the enactment of the 1793 Act, Chief Justice Marshall described the context of the 1780s and 1790s by stating:

> At the time the constitution was framed, the idea of appealing to an American court of justice for an assertion of right or a redress of wrong, had perhaps never entered the mind of an Indian or his tribe. Their appeal was to the tomahawk, or to the government. *This was well understood by the statesmen who framed the constitution of the United States, and might furnish some reason for omitting to enumerate them from among the parties who might sue in the courts of the union.*

Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 18 (1831) (emphasis added). Many of the framers of the Constitution were also members of Congress in 1793, and would have continued to understand that Indian tribes would not file suit. Quite apart from whether as a technical matter Indian tribes had legal capacity to bring suit or courts had jurisdiction to hear those suits, Congress would not have intended to create an implied private right of action for Indian tribes when it was virtually inconceivable that Indian tribes would bring such suits.[11] Any problems arising from inadequate enforcement of the land transfer provision of the 1790 Trade and Intercourse Act would not have been cured by providing Indian tribes with a private right of action to enforce the provision in the 1793 Act. Congress would have believed that the executive branch of the federal government would be the only entity that could enforce the land transfer provision of the 1793 Act. Understanding this, Congress made the executive branch responsible for enforcing the land transfer provision of the 1793 Act by establishing criminal penalties and also by authorizing the President to take "such measures as he might deem necessary" to remove unauthorized settlers.

Executive branch enforcement of the land transfer provision of the 1793 Act was also the only practicable way to accomplish the primary purpose of the 1793 Act, which was to preserve peace on the frontier. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 201 (1978) (purpose of 1790 Act was "to prevent destructive retaliations by the Indians", quoting President Washington); *Mohegan Tribe v. Connecticut*, 638 F.2d 612, 622 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981); Prucha, *supra* n.10, at 8. In *Mohegan Tribe* the United States Court of Appeals for the Second Circuit stated: "it is true that peace along the frontier, and in particular the prevention of encroachment by non-Indian settlers on Indian lands along the frontiers, were primary objects of the Act's land provisions."[12]

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[11] In this context it is important to keep in mind that the 1793 Act was a temporary act that by its terms would only "be in force, for the term of two years, and from hence to the end of the next session of Congress, and no longer." Act of March 1, 1793, ch. 19, § 15, 1 Stat. 329. Thus Congress would not have been looking ahead to a time when Indian tribes would have become sufficiently knowledgeable about the non-Indian culture to be in a position to bring lawsuits in federal court.

[12] 638 F.2d at 622. One of the leading authorities on the Trade and Intercourse Act has written:

Congress had good reason to be concerned with preserving peace on the frontier in 1793. In 1790 and again in 1791 a United States army had marched into the Ohio country, and both times the Indian tribes had routed the army, inflicting heavy casualties. D. Smith, *The American Diplomatic Experience* 20 (1972). The demonstrated military prowess of the Indian tribes was made even more ominous by the presence of British military posts on United States soil in violation of the Treaty of Paris of 1783 between Great Britain and the United States ending the Revolution. *Id.* at 19-20. These posts were widely suspected of providing arms and encouragement to Indian tribes engaging in conflicts with the United States and held out the promise of an alliance between Great Britain and the Indian tribes to exploit American weaknesses in the hope of reversing the outcome of the American Revolution. *Id.*; *see* F. Cohen, *Handbook of Federal Indian Law* 419 (AMS Press reprint of 1942 edition).

Two events, both occurring after the enactment of the 1793 Act, reduced the military threat posed by the Indian tribes. The first was the victory of a United States army over the northwest Indian tribes at the Battle of Fallen Timbers, near Detroit, in 1794. D. Smith, *The American Diplomatic Experience* 25 (1972); Prucha, *supra* n.10, at 156. The second event was the signing of the Jay Treaty on November 14, 1794, which led to the removal of British military posts from the United States

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The goal of American statemen was the orderly advance of the frontier. To maintain the desired order and tranquility it was necessary to place restrictions on the contacts between the whites and the Indians. The intercourse acts were thus restrictive and prohibitory in nature—aimed largely at restraining the actions of the whites and providing justice to the Indians as the means of preventing hostility. But if the goal was an *orderly* advance, it was nevertheless *advance* of the frontier, and in the process of reconciling the two elements, conflict and injustice were often the result.

Prucha, *supra* n.11, at 3 (emphasis in original); *see also id.* at 48.

in 1796. D. Smith, *The American Diplomatic Experience* 24-25. The Congress that enacted the 1793 Act could not have known, of course, that either of these events would occur.[13]

III. The Oneida Claim Is Barred Because It Was Not Brought Until 175 Years After the Conveyance At Issue.

Assuming *arguendo* that the Oneidas have a cause of action under federal law and that the United States has not ratified the 1794 transaction, the Oneida claim is nevertheless precluded because it was not brought until 175 years after the 1795 transaction that is the subject of the claim. First, the courts below should have applied a federal statute of limitations derived by borrowing the most analogous state statute of limitations. Regardless of the particular New York statute of limitations chosen, the 175-year-old Oneida claim would be barred. Secondly, the Oneida claim should be barred by the federal law of laches. Finally, the Oneida claim should be barred with respect to those landholders who can establish that they

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[13] The Court of Appeals below apparently overlooked its own prior decision in *Mohegan Tribe* as well as the historical context outlined above when it stated that "[i]t is beyond dispute that the Nonintercourse Acts were enacted for the protection of Indian tribes as beneficiaries." 719 F.2d at 532, Jt. App. at 219a. While protection of Indian tribes is concededly the purpose of the act *today*, 190 years after the Trade and Intercourse Act was first enacted, the historical context described above shows that the protection of Indian tribes was not the primary purpose of the land transfer provision of the 1793 Trade and Intercourse Act. Furthermore, the concept of Indian tribes as wards or beneficiaries of the federal government acting as their trustee had not been developed in the law in 1793. It was not until 40 years later that Chief Justice Marshall wrote of Indian tribes: "Their relation to the United States resembles that of a ward to his guardian." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *accord*, *Felix S. Cohen's Handbook of Federal Indian Law* 220 (1982 ed.) ("the concept of a federal trust responsibility to Indians evolved judicially. It first appeared in Chief Justice Marshall's decision in *Cherokee Nation v. Georgia*.").

or their predecessors in title are bona fide purchasers with respect to the Oneida claim.

Statutes of limitation perform an important jurisprudential function. As this court has stated:

> Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944); *accord Board of Regents v. Tomanio*, 446 U.S. 487-88 (1980); *United States v. Kubick*, 444 U.S. 111, 117 (1979). Despite this important judicial function served by statutes of limitations, both the Court of Appeals and the district court below held that no statute of limitations applied to bar the Oneida claims.[14] The courts below similarly held that related defenses, such as laches and bona fide purchaser for value, also did not apply.[15] In holding that statutes of limitation did not apply to bar the Oneida claim, the courts below relied on several other lower court decisions that have held that such defenses do not apply to Indian tribes asserting Nonintercourse Act claims.[16]

There appear to be two reasons why the courts below held that time-limitation defenses do not apply to claims

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[14] Jt. App. at 232a-33a; *id.* at 71a-76a.

[15] Jt. App. at 232a-33a; *id.* at 71a-76a.

[16] *See, e.g., Schaghticoke Tribe of Indians v. Kent School Corp.*, 423 F. Supp. 780 (D. Conn. 1976); *Narragansett Tribe of Indians v. Southern Rhode Island Land Development Corp.*, 418 F. Supp. 798 (D.R.I. 1976).

such as the one asserted by the Oneidas. *See* Crane, *supra* n.9, at 855 n.7. First, the courts reasoned that such defenses are state law defenses and that state law defenses cannot cut off a federal right. *See* Jt. App. at 232a. This reasoning completely misconstrues the Counties' argument. The Counties assert the statute of limitations defense as a matter of *federal* law, and refer to state law solely as a source from which the federal courts can derive the *federal* statute of limitations. Federal courts have often fashioned *federal* statutes of limitations by borrowing from the most closely analogous state law. *E.g., United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56, 60 (1981); *Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 210 n.29 (1976). In *Tomanio* this court stated:

> The importance of policies of repose in the federal, as well as in the state, system is attested to by the fact that when Congress has provided no statute of limitations for a substantive claim which is created, this Court has nonetheless "borrowed" what it considered to be the most analogous state statute of limitations to bar tardily commenced proceedings. [Citation omitted.] This is obviously a judicial recognition of the fact that Congress, unless it has spoken to the contrary, did not intend by the mere creation of a "cause of action" or "claim for relief" that any plaintiff filing a complaint would automatically prevail if only the necessary elements of the federal substantive claim for relief could be established.

Board of Regents v. Tomanio, 446 U.S. 478, 488 (1980).[17]

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[17] The Court of Appeals held that New York's statute of limitations should not be borrowed because "[a]pplying New York's statute would permit a violation of the 1793 Act to go unremedied, and thus would be patently inconsistent with the Trade and Intercourse Acts." Jt. App. at 232a. This reasoning is plainly wrong. *See Board of Regents v. Tomanio*, 446 U.S. 478, 488 (1980) (quoting *Robertson v. Wegmann*, 436 U.S. 584, 593 (1978)).

The second reason cited by the courts below to deny the application of the statute of limitations defense to the Oneida claim is that the defense does not apply to the United States. Since the United States could bring suit on behalf of an Indian tribe, and in doing so would normally be immune from a statute of limitations defense, the courts reasoned that an Indian tribe bringing suit in its own behalf should have the same immunity as the United States. The Court of Appeals below stated "[i]t would be anomalous to allow the trustee [i.e. the United States] to sue under more favorable conditions than those afforded the tribes themselves." Jt. App. at 232a.

It is far from obvious, however, why it is "anomalous" to treat Indian tribes differently from the United States. The United States, as sovereign, is entitled to immunity from certain defenses because of its unique governmental responsibility. This unique governmental responsibility of the United States makes it eminently reasonable to treat the United States differently from Indian tribes. The real anomaly is that this immunity, which is afforded to the United States because it is the United States, can be utilized by an Indian tribe in litigation in which the United States is *not* a participant.

The Oneida claim should also be barred by the doctrine of laches applied as a matter of federal law. *See Holmberg v. Armbrecht*, 327 U.S. 392, 395 (1946); *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 804-05 (8th Cir. 1979), *cert. denied*, 445 U.S. 913 (1980). The doctrine of laches is one of the principles of repose applied by federal courts in order to assure

> that old grievances will some day be laid to rest, that litigation will be decided on the basis of evidence that remains reasonably accessible and that those against whom claims are presented will not be unduly prejudiced by delay in asserting them.

Environmental Defense Fund, Inc. v. Alexander, 614 F.2d 474, 481 (5th Cir.), *cert. denied*, 449 U.S. 919 (1980).

Laches has been applied by the Supreme Court to bar Indian claims to land in circumstances considerably less compelling than those present in this case. In *Felix v. Patrick*, 145 U.S. 317 (1892), the heirs of an Indian sued to recover land from Patrick and his grantees. Patrick, in violation of an Act of Congress restricting the transfer of the land, had acquired the land from Felix under a conveyance that had been procured by fraud. By the time the suit was brought the land had become a part of the city of Omaha, Nebraska, and had greatly appreciated in value.

This Court held that the action was barred by laches.

> The real question is, whether equity demands that a party who, 28 years ago, was unlawfully deprived of a certificate of muniment of title of the value of $150, shall now be put in the possession of property admitted to be worth over a million. The disproportion is so great that the conscience is startled, and the inquiry is at once suggested, whether it can be possible that the defendant has been guilty of fraud so gross as to involve consequences so disastrous.

Id. at 333. In affirming the dismissal of the action for laches, the Court emphasized several other considerations, including

> that which was wild land thirty years ago is now intersected by streets, subdivided into blocks and lots, and largely occupied by persons who have bought upon the strength of Patrick's title, and have erected buildings of a permanent character upon their purchases.[18]

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[18] *Id.* at 334. *See also Schrimpscher v. Stockton*, 183 U.S. 290 (1901); *Lemieux v. United States*, 15 F.2d 518 (8th Cir. 1926). Laches was held to be inapplicable to the facts of *Ewert v. Bluejacket*, 259 U.S. 129 (1922), because the defendant in that case,

The landholders subject to the Oneida claim stand in a much more favorable position in the eyes of equity than did the defendants in *Felix v. Patrick*. Here the Oneidas have waited 175 years before bringing their claim, rather than the 28-year period that had elapsed in *Felix*. During those 175 years an enormous structure of investments, expectations, foregone opportunities and other forms of reliance has been established with respect to the land on the basis of the validity of the title obtained by New York in 1795. Consequently, this Court should conclude that the Oneida claim is barred by the federal law of laches.

In addition to being barred by federal statute of limitations and federal laches defenses, the Oneida claim should also be barred with respect to those landholders who can establish that they or their predecessors in title are bona fide purchasers with respect to the Oneida claim. As this Court recognized in *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926):

> It is impossible, however, to rescind the cession and restore the Indians to their former rights, because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers . . . .

Under the well-established equitable doctrine of bona fide purchaser, a landholder who can establish that he (1) purchased property in good faith, (2) without notice of any defects in title or adverse claims, and (3) for a valuable consideration, is immune from an adverse claim.[19]

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an Indian agent who had purchased land from Indians it was his job to protect, had acted in bad faith, while the doctrine of laches was "designed to protect good faith transactions." 259 U.S. at 138.

[19] *See, e.g., Wright-Blodgett Co. v. United States*, 236 U.S. 397, 403-05 (1915); *United States v. California & Oregon Land Co.*, 148 U.S. 31, 42 (1893); *Colorado Coal & Iron Co. v. United States*, 123 U.S. 307, 311-17 (1887); *United States v. Koleno*, 226 F. 180, 182-83 (8th Cir. 1915); *United States v. Eaton Shale Co.*, 433 F. Supp. 1256, 1267 (D. Colo. 1977); *United States v. Demmon*, 72 F. Supp. 336 (D. Mont. 1947).

If landholders subject to the Oneida claim can satisfy the three elements of the bona fide purchaser doctrine, as it appears likely they can, the doctrine should be held to provide a complete defense to the Oneida claim.

Courts have long recognized the importance of the bona fide purchaser doctrine. As Chief Justice Marshall noted almost 175 years ago, without the doctrine "[a]ll titles would be insecure, and the intercourse between man and man would be very seriously obstructed . . . ."[20]

Courts have applied the bona fide purchaser doctrine to protect purchasers of Indian lands.[21] For example, in *Duncan v. Andrus*, 517 F. Supp. 1 (N.D. Cal. 1977), the court ruled that the termination of an Indian rancheria (a small reservation) by the Secretary of the Interior was "unlawful and void." When the rancheria was terminated, the Indians had received fee title to the land and subsequently over three-fourths of the land was conveyed to third parties. In fashioning relief for the void termination, the court allowed the Indians still holding the land to reconvey their land to the United States in trust, but protected the third party purchasers. The court stated that the Indians who transferred their land to bona fide purchasers should pursue claims for monetary relief against the United States. *Id.* at 6. The court stated:

> [T]he rights of third party non-Indian good faith purchasers, who hold 77% of the residential acreage

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[20] *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 134 (1810); *accord Boone v. Chiles*, 35 U.S. (10 Pet.) 177, 210-11 (1836).

[21] *See United States v. Debell*, 227 F. 760 (8th Cir. 1915); *United States v. Jacobs*, 195 F. 707 (8th Cir. 1912); *Pechanga Band of Mission Indians v. Kacor Realty, Inc.*, No. CU-78-4499-MML, slip op. at 9 (C.D. Cal. Aug. 22, 1980), *aff'd on other grounds*, 680 F.2d 71 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); *Duncan v. Andrus*, 517 F. Supp. 1 (N.D. Cal. 1977); *Bisek v. Bellanger*, 5 F.2d 994 (D. Minn. 1925); *cf. Thlocco v. Magnolia Petroleum Co.*, 141 F.2d 934 (5th Cir.), *cert. denied*, 323 U.S. 785 (1944) (bona fide purchaser of oil and gas lease from Indian protected).

> on the Rancheria, must be protected. These transferees may have taken record title without knowledge of the intricacies of the fiduciary obligations of the Secretary and any resulting ownership defects. This will be accomplished through a declaration that only Indian distributees or their Indian transferees hold under voidable deeds. Only those persons will have the option of reconveying to the government. Those distributees who sold their land will retain their right to pursue monetary remedies in the Court of Claims.

Id.

The claim asserted by the Oneidas in this case is extraordinary. Their contention that the 1795 acquisition by New York was void and ineffective to pass title and that no subsequent events divested them of their right to possession threatens to upset 190 years of land transactions in New York. The burden of this extraordinary claim falls most directly on the thousands of private landholders residing on the land two centuries later, who purchased their land in complete good faith. Under the theory espoused by the Oneidas and adopted by the courts below, these innocent landholders are trespassers with no right to possess the land they hold. If the ruling below is followed to its logical conclusion, the Oneidas are apparently entitled to obtain ejectment of all the landholders within the 100,000 acre tract.

The Oneidas, perhaps awed themselves by the audacity of their claim, suggest that enforcing their purported right to possession of the 100,000 acre tract is not their true goal. *See* Brief of Oneida Indian Nation of Wisconsin and Oneida Indian Nation of New York in Opposition to Petitions for Certiorari 20-22. Rather, their goal is to obtain "an equitable settlement implemented by an act of Congress." *See id.* at 20. In an explanation of their strategy that is the height of understatement, the Oneidas note that "legal rulings made in this and other suits have played a constructive role in the legislative settlements," *id.* at 21, and that one "cannot lightly gainsay the familiar relation between the availability of judicial redress and the settlement of claims." *Id.* at 22. Phrased more bluntly, the Oneidas hope to use the threat to innocent landholders posed by their extraordinary claim to compel Congress to buy them off.

The Oneidas should not be permitted to use innocent landholders as their hostages in a war of nerves with Congress. The Oneidas may well be entitled to some compensation from the federal government for its breach of duty in failing to protect their interests two centuries ago. Congress provided a remedy for this breach of duty in the Indian Claims Commission; the Oneidas invoked the remedy and prevailed, only to renounce their victory, undoubtedly in the hope of obtaining a greater recovery from Congress by pursuing their present strategy.[22] Perhaps the remedy provided by Congress in the Indian Claims Commission Act was unduly parsimonious, or perhaps not, but it is for Congress to determine whether the Oneidas should receive some greater recovery.[23] The Oneidas should not be allowed to bolster their case before Congress with a claim grounded on the legal fiction—for it is a fiction—that the federal government intended 100,000 acres in central New York to remain in the possession of the Oneidas for the past 190 years, but stood by and permitted the State of New York, the Counties and countless private landholders to develop the wilder-

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[22] *See* note 6, *supra*.

[23] The Oneidas are not the only tribe that has sought to turn its back on the remedy provided by the Indian Claims Commission in the hope of obtaining a greater recovery from Congress by asserting a present right to possess huge amounts of land. *See, e.g., United States v. Dann*, 706 F.2d 919 (9th Cir. 1983), *cert. granted*, No. 83-1476 (May 29, 1984) (Indian Claims Commission award of $26 million covering 22 million acres of land); *Oglala Sioux Tribe of the Pine Ridge Indian Reservation v. United States*, 650 F.2d 140 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (Indian Claims Commission award of $105 million covering 7.3 million acres of land). In all these cases it is for Congress to determine if some additional recovery is warranted.

ness by building cities, homes, farms, businesses, and highways. The federal government has treated the 1795 acquisition as valid for the past 190 years, and it is simply too late to reverse that judgment now.

CONCLUSION

The judgment of the Court of Appeals, insofar as it affirmed the District Court's holding of liability against the Counties, should be reversed.

Respectfully submitted,

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